

No. 13059.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA ELECTRIC POWER COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Jurisdiction.

Pursuant to the provisions of Sections 1346(b) and 2671, *et seq.*, of Title 28, U. S. C. A., commonly known as the Tort Claims Act, Appellant filed this action against Appellee in the United States District Court for the Southern District of California, Central Division, on August 30, 1950, and the jurisdiction of that court was based on said Section 1346(b) [R. 3]. After answer [R. 6] by Appellee the cause was regularly tried before the Court, sitting without a jury, on June 12, 1951 [R. 18]; the District Court promulgated its findings of fact and conclusions of law, and its judgment for Appellee on June 28, 1951 [R. 9, 14].

Appellant, being aggrieved thereby, filed its notice of appeal in the District Court on July 18, 1951 [R. 16]. This Court has jurisdiction to review such decision pursuant to 28 U. S. C. A. 1291, and the venue is properly laid in the Ninth Circuit, 28 U. S. C. A. 1294(1).

Statement of the Case.

This is an action filed by Appellant against the United States under the Federal Tort Claims Act to recover money damages for injury to Appellant's electric transmission line by a radio-controlled Navy drone target plane which crashed into said line on March 8, 1950.

The facts in this case are simple and, for the most part, undisputed. Appellee's answer admits [R. 6] that on or about March 8, 1950, and at about the hour of 10:05 A. M., certain Navy pilots based at the U. S. Naval Auxiliary Air Station, El Centro, California, were engaged in air to air gunnery exercises over the Chocolate Mountain gunnery range; that said pilots were firing on a drone target plane which was radio-controlled and operated by one of the pilots; that each of said pilots was employed by the United States of America and each was acting within the scope of his office or employment. Further, it was stipulated [R. 20] that Appellant is a corporation organized and existing under the laws of the State of Delaware and duly authorized to do business as a public utility corporation in the State of California; that on March 8, 1950, Appellant was the owner and possessor of that certain 88 kv electrical transmission line extending from Calipatria, California, to Blythe, California; that about 10:05 A. M., March 8, 1950, a Navy drone target plane (T D 2 C -1, Navy, 120001) crashed into said transmission line; that as a result of said crash steel poles Nos. 170, 171, 172 and 173 were caused to split and break, steel pole No. 168 was twisted and bent, and all three conductors were brought down; that said poles were located within the boundaries of the Chocolate Mountain gunnery range.

The only dispute was over the amount of Appellant's damage, and whether that damage was caused by the negligent or wrongful act of Appellee.

Appellant's evidence showed [R. 23], and the District Court found [R. 11, 12] that Appellant was damaged in the amount of \$7,330.75.

At the conclusion of Appellant's evidence the United States moved to dismiss the action on the grounds that Appellant had failed to show negligence and that the doctrine of *res ipsa loquitur* did not apply [R. 27, 28]. This motion was denied [R. 35].

Faced with the necessity of overcoming an inference of negligence, the United States presented evidence which consisted of the testimony of three Navy pilots whose duty it was to operate and control the drone target plane (hereafter sometimes referred to as "drone" or "drone plane"). They testified substantially as follows:

JOHN L. CULBERT, AD 1ST CLASS AP:

He is a qualified enlisted pilot experienced in the operation and control of drone planes [R. 37]. The Chocolate Mountain gunnery range covers an area approximately 70 miles long from north to south, and approximately 27 miles wide from east to west [R. 43]. The power line crosses the range, from west to east, approximately midway between the north and south boundaries [R. 46, 47]. The drone plane involved in this case was under the primary control of Lts. Smith and Stephenson who were flying in a two-seated aircraft known as the Charlie One

plane [R. 38, 41]. He, Culbert, was flying a single-seated aircraft known as the Charlie Two plane, a secondary control plane. It was his duty to take control of the drone plane when ordered to do so by Charlie One. It was his further duty, upon orders from Charlie One, to destroy the drone plane if it went out of control and endangered public property or threatened to leave the gunnery range [R. 37, 42]. The function of Charlie One and Charlie Two was simply to operate and control the drone target plane. The actual shooting was done by other pilots, flying other Navy planes, known as the firing group; the number involved is confidential [R. 39, 41]. These pilots fired upon the drone at an altitude of 8000 feet [R. 38]. The drone plane was struck while on a southeast heading near the center of the gunnery range [R. 38]. At that point Charlie One lost control and ordered Charlie Two to take over. He attempted, but was unable to regain control [R. 42]. He was ordered to follow the drone plane down and investigate the wreckage [R. 47]. There was not much reason for him to destroy the drone plane. It was going straight in [R. 38]. He didn't see the power line until after the drone had crashed [R. 49]. He had attended a firing conference before starting on the gunnery mission. There he had seen a chart of the Chocolate Mountain gunnery range upon which was shown the power line, but no one pointed out its presence to him. He did have knowledge, at the time the drone plane was being fired upon, that the line crossed the range. He knew its approximate location in relation

to the range [R. 45, 46]. The objective of the mission was to shoot down and destroy the drone plane [R. 51]. Approximately 90% of the drone planes fired upon in air to air gunnery exercises are shot down [R. 43]. Nothing unusual happened on this mission [R. 45].

BURTON EDWARD SMITH, SENIOR LIEUTENANT:

He is a qualified pilot, experienced in the operation and control of drone target planes [R. 54]. He was piloting Charlie One. Immediately after the drone plane was hit it went into a sharp turn to the left and spiralled toward the ground. Charlie Two was ordered to take control. Every effort was made to regain control. They were over the firing area and there was no reason to give an order to Charlie Two to destroy the drone plane [R. 56]. The maps that were used indicated that there was a power line in the firing area [R. 57]. There were no orders not to fire on the drone when it was in the vicinity of the power line. So far as orders were concerned it was perfectly all right for the drone to be shot down any place in the gunnery range. It was presumed that there was nothing in the range to destroy or endanger; that so long as the exercise was conducted over the range nothing could be hurt [R. 59, 60]. Nearly every drone plane taken on a gunnery exercise is shot down. Only a small percentage is brought back to the base [R. 57]. He had been on about twenty missions similar to the one in question. All followed the same pattern. Nothing unusual occurred this time [R. 64].

CLAUDE MARTIN STEPHENSON, LIEUTENANT J.G.:

He is an experienced pilot qualified in the operation and control of drone planes [R. 65]. He acted as co-pilot of Charlie One and actually controlled the drone plane until it was hit. After he lost control of the drone he ordered Charlie Two to take control. Charlie Two acknowledge he had his control gear on but was unable to regain control [R. 67]. The drone's radio equipment was checked, and found in order, prior to take-off. The chance that the drone would go out of control purely on its own accord is very small [R. 70]. At the briefing he had seen charts and the power line was marked on the charts [R. 68]. No one in higher authority pointed out the power line or told him to be careful of it [R. 71]. He didn't receive, or know of, any orders that firing was not to be done in the vicinity of the power line. They assumed there was nothing they could hurt in the Chocolate Mountain Area [R. 71]. The drone crashed approximately 30 seconds after it started to descend [R. 73]. It came down in an increasing spiral which had reached a diameter of from four to five miles by the time it struck the ground [R. 72, 73]. Nothing unusual happened during the mission. It was a routine operation [R. 70].

After all its evidence was in, the United States again moved to dismiss the action [R. 74] and contended, as grounds therefor:

1. That Congress had not consented under the Tort Claims Act to the imposition of liability under a theory of liability-without-fault;

2. That the doctrine of *res ipsa loquitur* is inapplicable under the facts of this case; and

3. That Appellant had failed to show negligence on the part of the Government.

The motion was denied [R. 75].

After hearing argument, the Court held that the Government had overcome the inference of negligence raised by the doctrine of *res ipsa loquitur* [R. 91], and that if a wrongful act had been shown which caused damage, it was *damnum absque injuria* [R. 91].

Specification of Errors.

1. The District Court erred in finding that the injury to Appellant's property was not caused by the negligent acts of the employees of the Government. The District Court's findings to that effect are not supported by any substantial evidence and are contrary to the evidence, and its holding to that effect is contrary to law. Reason: The evidence shows that Appellee, knowing of the existence and location of Appellant's property, engaged in an air to air gunnery exercise, the purpose of which was to shoot down a drone airplane, directly over that property; that the drone plane was shot down and crashed into said property.

2. The District Court erred in finding that the injury to Appellant's property was not caused by the trespass of employees of the Government. The District Court's findings to that effect are not supported by any substantial evidence and are contrary to the evidence, and its holding

to that effect is contrary to law. Reason: The evidence shows that Appellee intentionally shot down a drone plane and intended it to fall to the ground any place within the confines of the Chocolate Mountain gunnery range; that it did fall within the range and onto Appellant's property.

3. The evidence would support a finding that the injury to Appellant's property was caused by the wrongful acts of the employees of the Government. The District Court erred in not making such a finding. There is no substantial evidence which would support a finding that the injury to Appellant's property was not caused by the wrongful acts of the employees of the Government. Reason: The evidence shows that Appellee, knowing of the existence and location of Appellant's property, engaged in an air to air gunnery exercise directly over that property; that during the course of said exercise it intentionally shot down a drone plane which crashed into Appellant's property.

Summary of Argument.

The pertinent provisions of the Tort Claims Act in so far as a decision of this case is concerned, are Sections 1346(b), 2674 and 2680 of Title 28, U. S. C. A. Section 1346(b) confers jurisdiction on the District Court. Section 2674 sets forth the extent of the Government's liability, and Section 2680 enumerates thirteen exceptions to the broad waiver of immunity. These three sections are set forth in full in the Appendix and hereafter will be referred to by section number only.

Broadly speaking, the Tort Claims Act provides that the Government shall be liable for injury to person or property caused by the negligent or wrongful acts of its employees under circumstances where the Government, if a private person, would be liable under the law of the place where the act occurred.

The first three points of our argument, which show that under California law the Government would be liable to Appellant under any one of three separate theories, may be summarized as follows:

1. The evidence shows that the Government conducted an air to air gunnery exercise, the objective of which was to shoot down a drone plane, directly over Appellant's property. By so doing it created an unreasonable foreseeable risk of harm to that property. The drone was shot down and crashed into Appellant's power line. The District Court's erroneous finding that the Government was not negligent was based solely on evidence tending to show that the pilots who controlled the drone plane used due care. We contend that even though the act may have been done in a careful manner, it was an act which a reasonably prudent man could foresee would probably cause injury to Appellant.

2. The evidence shows that the Government intentionally, wilfully and voluntarily shot down the drone plane and intended it to fall to the ground any place within the confines of the gunnery range. It did fall within the range and onto Appellant's power line. As a direct re-

sult of this intentional unauthorized invasion of its property Appellant was injured. There is no substantial evidence to support the District Court's finding that the Government did not trespass on Appellant's property.

3. Under the law of California, one who engages in an ultrahazardous activity is absolutely liable for the damage he causes. Under the standards and tests of California law, one who takes aloft and shoots down a drone plane is engaged in an ultrahazardous activity.

Our fourth point, which shows that the act complained of was a "negligent or wrongful act" within the meaning of those words as used in the Tort Claims Act, may be summarized as follows:

4. The Tort Claims Act is a broad waiver of sovereign immunity against suit on torts. Its purpose was to transfer consideration of all tort claims, with certain specified exceptions, from Congress to the Courts. The Act should not be construed so as to add to the exceptions; it should be liberally construed. The words "negligent or wrongful act" are broad and comprehensive enough to encompass any act giving rise to a claim sounding in tort. Any act giving rise to a tort claim actionable under local law is a "negligent or wrongful act" within the meaning of 1346(b).

We conclude that regardless of the theory upon which the California Courts would predicate liability, the Government engaged in a negligent or wrongful act and would, if a private person, be liable in accordance with the law of the place where the act occurred. It follows that the Government is liable under the Tort Claims Act.

ARGUMENT.

1. The Evidence Does Not Support the District Court's Finding That the Injury to Appellant's Property Was Not Caused by the Negligent Acts of Appellee.

The District Court properly held [R. 13, 35] that the doctrine of *res ipsa loquitur* was applicable. The effect of this holding was to establish a *prima facie* case by raising an inference that Appellant's injury was caused by the negligence of the Government. (*Allbritton v. Interstate Transit Lines*, 31 Cal. App. 2d 149, 87 P. 2d 704; *Dierman v. Providence Hospital*, 31 Cal. 2d 290, 188 P. 2d 12.) In order to rebut the inference and overcome the *prima facie* case, the Government offered evidence consisting of the testimony of the three pilots charged with the operation and control of the drone plane. They testified that the purpose of the mission was to shoot down the drone plane [R. 51]; that the plane was shot down [R. 55], as it almost always was in such missions [R. 57, 61]; that it went out of control after it was struck [R. 67]; that they did all they could to regain control, but were unsuccessful [R. 67]; that nothing unusual happened on this mission [R. 70]. Viewed in the light most favorable to Appellee, this evidence shows that the pilots who controlled the drone plane exercised due care in following out their orders. They did not negligently let the drone go out of control. But this certainly is insufficient to rebut the inference that Appellee was negligent. It does not lead to the conclusion that the accident could not have happened from want of care but must have been due to some unpreventable cause, as is required by California law. (*Dierman v. Providence Hospital*, 31 Cal. 2d 290, 188 P. 2d 12, 15.)

Entirely apart from the inference, however, the evidence clearly shows that Appellee was negligent. And, there is no substantial evidence to the contrary. Even though we assume that the act was done in a most careful manner, it was an act which a reasonably prudent man could foresee would create an unreasonable risk of harm to Appellant's property. Appellee knew of the existence and exact location of Appellant's power line; the line was shown on maps and charts used in briefing the pilots [R. 45, 46]. Appellee sent out its pilots on an air to air gunnery mission with orders to shoot down the drone plane anywhere within the confines of the gunnery range [R. 60]. The drone plane on this type mission is almost always shot down [R. 57, 61]. No precautions were taken to protect Appellant's property from harm [R. 71]. The drone plane was shot down almost directly over Appellant's property [R. 38, 71, 72, 73]. After it was struck it went out of control [R. 56] and crashed into Appellant's power line [R. 56].

A breach of the duty to use ordinary care is negligence, and, if injury results, is actionable in California. We deem it unnecessary to cite cases. Appellee breached that duty and created a serious risk of harm to Appellant's property when it wilfully shot down the drone over that property. Appellee created the risk, disregarded it, and went right ahead to injure Appellant. Now it contends, in effect, that since the pilots who controlled the drone didn't negligently fly it into the power line it is not liable.

If all the Government need do is offer evidence that the pilots controlling the drone plane used due care, the chances are that no plaintiff in a case like this can recover. Unless the Government is held negligent when it engages

in air to air gunnery over private property regardless of the care used in carrying out the exercise, drone planes can be shot down and dropped through any person's home without liability.

The fact that Appellant's power line is located in a remote area is immaterial. It is obvious that the risk of harm to any particular piece of property is in no wise dependent upon the character of the surrounding area. If an unreasonable risk of harm was not created when Appellee shot down the drone plane over Appellant's property it would not be created, as to any home owner, if Appellee shot down a drone plane over a town. Such cannot be the law.

We submit that Appellee created an unreasonable foreseeable risk of harm to Appellant's property; that Appellant's injury was the direct and proximate result of Appellee's negligence.

2. The Evidence Does Not Support the District Court's Finding That the Injury to Appellant's Property Was Not Caused by the Trespass of Appellee.

The uncontroverted evidence shows that the shooting down of the drone plane was an intentional, wilful and voluntary act; that the purpose of the mission was to shoot down the plane [R. 51]. Appellee knew of the existence and exact location of Appellant's power line [R. 57]. The drone was shot down almost directly over that power line [R. 38, 71, 72, 73]. Appellee intended the drone to crash wherever it might fall within the confines of the gunnery range [R. 60]. No attempt was made to destroy or cause

the drone to crash in a spot other than where it was headed [R. 56]. Consequently, Appellee intended the drone to crash just where it did. The injury to Appellant's power line was the direct result of Appellee's act.

Regardless of whether Appellant's power line be considered real property or personal property, any unlawful interference therewith or unauthorized invasion thereof gives rise to an action in the nature of trespass under California law. (24 Cal. Jur., Trespass, Secs. 8 and 9.) Throwing or placing something on another's property is a trespass. (Rest. Torts, Secs. 158, 217.)

Certainly the destruction of Appellant's property under the facts of this case constitutes an unlawful interference therewith or unauthorized invasion thereof. We cannot understand the reasoning behind any contention that the Government did not engage in a wrongful act when it shot down the drone plane above private property. If the Government finds it necessary to engage in such activities it should either keep its distance from private property or stand ready and willing to compensate for any damage it causes. It has no right to trespass on private property without liability.

There is no substantial evidence in the record which would support a finding that Appellee did not trespass on Appellant's property.

3. Under California Law, One Who Engages in an Ultrahazardous Activity Is Absolutely Liable for the Injuries He Causes.

In the leading case of *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 Pac. 952, the California Supreme Court held that an oil well driller was liable, irrespective of negligence, for damage resulting to plaintiff's property when the oil well erupted. The Court said (270 Pac. 952, 955):

"It ought to be and we are of the view that it is the rule that, where an injury arises out of, or is caused directly and proximately by the contemplated act or thing in question, without the interposition of any external or independent agency which was not or could not be foreseen, there is an absolute liability for the consequential damage, regardless of any element of negligence either in the doing of the act or in the construction, use or maintenance of the object or instrumentality that may have caused the injury."

In the case of *Luthringer v. Moore*, 31 Cal. 2d 489, 190 P. 2d 1, the California Supreme Court made it clear that the rule announced in *Green v. General Petroleum*, *supra*, should be applied in all cases where the wrongdoer was engaged in an ultrahazardous activity. The Court cites with approval (190 P. 2d 1, 7) the definition of ultrahazardous activity which is contained in Section 520 of the Restatement of Torts:

"An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage."

The Government, in the case at bar, took aloft and shot down a radio-controlled drone target plane. By so doing, the Government necessarily created a risk of serious harm to persons and property on the ground. Obviously, this risk could not be eliminated by the exercise of the utmost care in carrying out the activity. There can be no argument that the taking aloft and shooting down of a radio-controlled airplane is a "matter of common usage."

Undoubtedly, the activity engaged in by the Government in this case falls within the definition of "ultra-hazardous" as stated by the Restatement of Torts and approved by the California Supreme Court. Since the Government was engaged in an ultrahazardous activity it is liable to Appellant under the law of the State of California, on a theory of absolute liability.

4. Any Act Giving Rise to Tort Liability Under the Law of the Place Where the Act Occurred Is a "Negligent or Wrongful Act" Within the Meaning of the Tort Claims Act.

The Government argued in the District Court that the doctrine of liability without fault was not applicable under the Tort Claims Act; that the Government was liable only for its negligent or wrongful acts, and that an act giving rise to liability without fault could not be considered a negligent or wrongful act. Under the first three points of our argument here we have set forth three separate theories under any one of which the California Courts would hold the Government liable to Appellant. We now contend that regardless of the theory upon which the California Courts would predicate liability, the act of the Government in shooting down the drone plane over Appellant's property must be considered a negligent or wrongful act.

The pertinent provisions of Sections 1346(b) and 2674 [Appendix] are as follows:

1346(b) “* * * the district courts * * * shall have exclusive jurisdiction of civil actions * * * for money damages * * * for injury or loss of property * * * caused by the *negligent or wrongful act* or omission of any employee of the Government * * * *under circumstances where the United States, if a private person, would be liable* * * * *in accordance with the law of the place where the act or omission occurred.*” (Emphasis added.)

2674 “The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *.”

Appellant is asserting a claim for money damages for injury to property. As shown by the first three points of our argument, the United States, if a private person, would be liable in accordance with the law of the place where the act occurred. Hence, if the act complained of (the shooting down of a drone plane over Appellant’s property) is a negligent or wrongful act, the United States is liable to Appellant.

This Court then is called upon to determine the meaning of the words “negligent or wrongful act” as those words are used in Section 1346(b).

Section 1346(b) is a broad waiver of sovereign immunity of the United States with respect to the ordinary run of tort claims. Its purpose was to relieve Congress of burdensome consideration of private bills. (*State Farm Mut. Liability Ins. Co. v. U. S.*, 172 F. 2d 737; *United States v. Campbell*, 172 F. 2d 500; *Perucki v. U.*

S., 80 Fed. Supp. 959.) It should be construed to give effect to its purpose.

That the words “negligent or wrongful act” should not be construed in such a manner as to exclude the act complained of is shown by the words of this Court in *Employers’ Fire Insurance Co. v. United States*, 167 F. 2d 655, 657:

“The Government has premised its position largely on the principle that statutes in derogation of sovereign immunity must be strictly construed. Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to that rule cannot be had in order to enlarge the exceptions.”

Two recent United States Supreme Court cases make it abundantly clear that resort to rule of strict construction cannot be had in order to limit the clear and sweeping waiver of immunity of the United States from suit on tort claims. (*United States v. Aetna Casualty & Surety Co.*, 338 U. S. 366; *United States v. Yellow Cab Co.*, 340 U. S. 543.)

We believe that the words “negligent or wrongful act,” as used in Section 1346(b), are broad and comprehensive enough to encompass any act which gives rise to a claim sounding in tort; that in using those words Congress intended to include all tort claims. The real limitation found in Section 1346(b) is that the claim shall be for money damages for injury to person or property. With the exceptions noted in Section 2680, none of which are applicable here, Congress intended that *all* claims for money damages for injury to person or property should

be actionable under the Tort Claims Act if actionable under local law.

Our belief is substantiated by the words of Judge Medina in *Niagara Fire Ins. Co. v. United States*, 76 Fed. Supp. 850, 855. Speaking of the "central core of meaning" of the Tort Claims Act, he said:

"The liability of the United States is not defined by the first sentence [now Section 1346(b)] nor is the jurisdiction conferred by the second [now Section 2674]; but the central core of meaning is the same in each, namely, that where the United States would be liable for damage or loss of property or on account of personal injury or death, if it were a private person, then in those cases, with the exceptions noted in Section 943 [now Section 2680], the person in whose favor such liability accrues may sue and recover in the proper District Court."

Those words indicate that Court would hold the Government liable under the Tort Claims Act in all cases, except those mentioned in Section 2680, where it would be liable under local law for injury to person or property.

For a recent Tort Claims case which indicates that the theory upon which liability under state law is based is immaterial, we respectfully direct the Court's attention to *Ure v. United States*, 93 Fed. Supp. 779. There, plaintiff's lands were flooded when a break occurred in an irrigation canal operated by the Government. The Court discussed three theories of liability; first, absolute liability imposed when one controls a dangerous force which escapes and does injury; second, absolute liability where one voluntarily sets in motion a physical body which invades the land of another; third, negligence where one dealing

with a potentially dangerous instrumentality fails to use the highest degree of care. The Court concluded that under the law of the place where the act occurred the Government would be liable under any one of those theories. It *held* that the state court would apply a rule of absolute liability and that the Government was liable under the Tort Claims Act.

We also respectfully direct the Court's attention to the case of *Feres v. United States*, 340 U. S. 135. At page 140 the United States Supreme Court says:

"Looking to the details of the Act, it is true that it provides, broadly, that the District Court 'shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * *.' *This confers jurisdiction to render judgment upon all such claims.* But it does not say that all such claims must be allowed. Jurisdiction is necessary to deny a claim on its merits as a matter of law as much as to adjudge that liability exists. We interpret this language to mean all it says, but no more. Jurisdiction of the defendant now exists where the defendant was immune to suit before; *it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law.*

"*For this purpose, the Act goes on to prescribe the test of allowable claims, which is, 'The United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances * * *' with certain exceptions not material here. 28 U. S. C. Sec. 2674, 28 U. S. C. A. Sec. 2674. It will be seen that this is not the creation of new causes of action, but acceptance of liability under circumstances that would bring private liability into existence.'* (Emphasis added.)

We submit that the correct rule should be, and is, that any act giving rise to tort liability under local law is a "negligent or wrongful act" within the meaning of the Tort Claims Act; that the theory upon which liability is predicated is immaterial.

Conclusion.

For the reasons set forth above, Appellant respectfully submits that the judgment of the District Court should be reversed and the cause remanded with instructions that judgment be entered in favor of Appellant.

Respectfully submitted,

HENRY W. COIL,

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APPENDIX.

(1) United States Code Annotated, Title 28, Sec. 1346(b):

“Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”

(2) United States Code Annotated, Title 28, Sec. 2674:

“Liability of United States

“The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

“If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual

or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.”

(3) United States Code Annotated, Title 28, Sec. 2680:

“Exceptions

“The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administer-

ing the provisions of Sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Railroad Company. June 25, 1948, c. 646, 62 Stat. 984, amended July 16, 1949, c. 340, 63 Stat. 444."

